

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2013 IL App (4th) 130305-U

NO. 4-13-0305

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 19, 2013
Carla Bender
4th District Appellate
Court, IL

| | | |
|--|---|------------------|
| SUSAN IRWIN, |) | Appeal from |
| Plaintiff and Counterdefendant- |) | Circuit Court of |
| Appellant, |) | Sangamon County |
| v. |) | No. 10MR77 |
| SHANNON C. SHYMANSKY, |) | |
| Defendant and Counterplaintiff- |) | |
| Appellee, |) | |
| and |) | |
| DUANE D. YOUNG, |) | |
| Respondent in Discovery, |) | |
| and |) | Honorable |
| LABARRE, YOUNG AND BEHNKE, a Law Firm, |) | Leo Zappa, |
| Claimant. |) | Judge Presiding. |

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* In January 2013, the trial court ordered plaintiff's counsel to transfer to defendant approximately \$14,668 that the counsel's law firm deposited in an "interest on lawyers trust account." The appellate court affirmed, (1) rejecting plaintiff's defective-service-of-process claim and (2) concluding that because plaintiff owned the money at issue, it was subject to turnover to partially satisfy the debt plaintiff owed to defendant.

¶ 2 The dispute in this case arises from an August 2006 real-estate contract involving a condominium unit owned by defendant and counterplaintiff-appellee, Shannon C. Shymansky (hereinafter, defendant), which later resulted in financial judgments being entered against plaintiff and counterdefendant-appellant, Susan Irwin (hereinafter, plaintiff).

¶ 3 In December 2012, defendant filed an amended "third party citation to discover assets pursuant to Supreme Court Rule 277(e) [(eff. July 1, 1982)]," seeking an accounting of the funds plaintiff transferred to her counsel's firm pursuant to a security retainer agreement.

¶ 4 Following a January 2013 hearing on that citation, defendant later filed a motion for a turnover order, requesting that the trial court order plaintiff's counsel, Duane D. Young, to turn over approximately \$14,668, which represented the remaining balance in an "interest on lawyers trust account" (trust account) plaintiff had with her counsel's firm.

¶ 5 Following a March 2013 hearing on defendant's turnover motion, the trial court ordered plaintiff's counsel to transfer the remaining trust account balance to defendant, in partial satisfaction of plaintiff's debt to defendant.

¶ 6 Plaintiff appeals, arguing that the trial court (1) lacked jurisdiction to consider defendant's amended third-party citation to discover, (2) erred by granting defendant's motion for turnover, and (3) erred by not holding an evidentiary hearing to determine the priority of the firm's claim to plaintiff's trust account funds. We disagree and affirm.

¶ 7 I. BACKGROUND

¶ 8 A. The Previous Issues Before this Court

¶ 9 This case involves an August 2006 real-estate contract involving a condominium unit owned by defendant. In the parties' first appeal, this court affirmed the trial court's grant of summary judgment in defendant's favor, concluding that plaintiff's agreement with defendant was a lease with option to purchase the unit instead of a contract for deed, as plaintiff claimed. We also affirmed the court's December 2010 award of \$20,000 in attorney fees to defendant based on a fee-shifting provision in the parties' contractual agreement. *Irwin v. Shymansky*, No. 4-11-0159

(Nov. 29, 2011) (unpublished order under Supreme Court Rule 23).

¶ 10 In the parties' second appeal, this court affirmed the trial court's grant of an additional \$26,012 in attorney fees to defendant. *Irwin v. Shymansky*, No. 4-12-1073 (July 30, 2013) (unpublished order under Supreme Court Rule 23).

¶ 11 B. The Pertinent Circumstances Preceding the Controversy at Issue

¶ 12 In May 2011, following the trial court's award of \$20,000 in attorney fees, defendant filed a citation notice, seeking an accounting of plaintiff's income and assets. Defendant sent the notice to plaintiff's counsel. At a June 6, 2011, hearing on defendant's citation notice, the court continued the matter because defendant failed to personally serve plaintiff with notice. That same day, plaintiff filed a document entitled, "Assignment," in an estate case involving her mother, Juanita Williams (decedent). In that filing, plaintiff assigned her anticipated distribution of decedent's estate, as follows:

"For valuable consideration, [plaintiff], does hereby assign, transfer, and convey to LaBarre, Young & Behnke [(hereinafter, firm)], all right, title, and interest in and to the Estate of [decedent], including any sums to be distributed under any order of Probate, by Small Estate Affidavit or operation of law, all in consideration of past, present, and future representation in [Sangamon County case No. 10-MR-77], including the appeal in *** appellate court case number 4-11-0159[.]

The Undersigned *** does further direct [the] Executor *** of [decedent's] Estate *** to honor this assignment."

(On April 8, 2011, plaintiff and the executor of decedent's estate signed the assignment.)

¶ 13 On July 2, 2011, defendant served plaintiff with an amended citation to discover assets. On July, 8, 2011, plaintiff filed a declaration of exemptions and testified at the citation hearing. (The record does not contain a transcript of that hearing.) Later that month, defendant filed a wage deduction notice to garnish plaintiff's wages. In August 2011, plaintiff's employer began garnishing her wages, which, in that first month, was \$358 of her \$2,259 monthly salary.

¶ 14 C. The Controversy at Issue

¶ 15 In November 2012, defendant filed a third-party citation notice directed at plaintiff's counsel. Two weeks later, plaintiff filed a motion to quash defendant's third-party citation, alleging, in pertinent part, defective service under section 2-1402(b) of the Code of Civil Procedure (735 ILCS 5/2-1402(b) (West 2010)). At a hearing conducted later that month, the trial court granted plaintiff's motion and ordered defendant to personally serve plaintiff's counsel.

¶ 16 On December 5, 2012, defendant filed an amended third-party citation to discover assets pursuant to Illinois Supreme Court Rule 277(e) (eff. July 1, 1982). Defendant later (1) personally served plaintiff's counsel with the citation and (2) served plaintiff by mailing the citation to plaintiff's counsel. The citation sought the following:

"All documents relating to the funds deposited with you or
your *** firm by *** [plaintiff].

All documents related to any funds or property owned by
*** [plaintiff], which are being held by you or your firm, including
but not limited to the property and funds *** [plaintiff] received
from her mother's estate.

All documents related to the funds and property you indicated you were holding for *** [plaintiff] at [her] Citation to Discover Assets [deposition] conducted on July 8, 2011.

Receipts of all payments or deposits made by *** [plaintiff] to you or your firm.

Receipts of all payments made by [plaintiff] to you or your firm, which were paid from funds or property deposited with you or your firm by [plaintiff]."

¶ 17 At a January 2013 hearing on defendant's amended third-party citation to discover assets, plaintiff's counsel testified that on June 16, 2011, the executor of decedent's estate delivered a \$73,874 check to his firm, which represented plaintiff's share of decedent's estate. The firm deposited the check into a trust account. Counsel explained that based on the supreme court's decision in *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 286, 875 N.E.2d 1012, 1018 (2007), his firm had a security retainer agreement with plaintiff.

¶ 18 Counsel then noted the following withdrawals from that trust account:

Payments to the Firm for Fees and Costs

| | |
|--------------------------|--------------------|
| June 24, 2011 | \$14,258.95 |
| July 26, 2011 | \$ 1,709.20 |
| August 9, 2011 | \$ 177.50 |
| November 27, 2012 | \$16,950.58 |
| <u>November 30, 2012</u> | <u>\$ 6,570.00</u> |
| TOTAL: | \$39,666.23 |

Payments made to Plaintiff

| | |
|--------------------|-------------|
| August 2, 2011 | \$ 975.66 |
| September 27, 2011 | \$ 2,000.00 |

| | |
|-------------------------|--------------------|
| December 1, 2011 | \$ 2,000.00 |
| January 25, 2012 | \$ 2,000.00 |
| August 24, 2012 | \$ 3,000.00 |
| October 3, 2012 | \$ 1,000.00 |
| October 10, 2012 | \$ 1,000.00 |
| <u>November 2, 2012</u> | <u>\$ 1,000.00</u> |
| SUBTOTAL: | \$12,975.66 |

On November 30, 2011, the firm paid \$6,564 to a travel agency for plaintiff's trip to Israel.

(During that same time frame, plaintiff paid defendant \$8,500; disbursements from the trust account for plaintiff's benefit totaled \$19,539.66.) Counsel explained that plaintiff would occasionally request funds to cover her monthly debt and her son's college expenses, especially after the garnishment of her wages. Counsel noted that although plaintiff could ask for the disbursements, "[s]he wasn't entitled to it," adding that the remaining \$14,668.22 in the trust account belonged to plaintiff "subject to my security only."

¶ 19 In February 2013, defendant filed a motion for a turnover order, requesting that the trial court require the firm to turn over the balance in plaintiff's trust account. At a March 4, 2013, hearing, the court (1) heard arguments on defendant's turnover motion, (2) took the matter under advisement, and (3) directed each party to submit a proposed order. On March 26, 2013, the firm filed a motion to intervene and claim trust funds. (Although filed, the record shows the court did not consider the firm's motion.)

¶ 20 On April 9, 2013, the trial court found that because the agreement between plaintiff and the firm was a security retainer agreement, plaintiff retained ownership of the remaining trust account funds until the firm applied charges for legal services performed. The court then ordered plaintiff's counsel to transfer the \$14,668.22 trust account balance to defendant, in partial satisfaction of plaintiff's debt, which as of February 1, 2013, was \$37,888.76.

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 A. Jurisdiction

¶ 24 Plaintiff argues that the trial court lacked jurisdiction to consider defendant's amended third-party citation to discover assets pursuant to Rule 277(e). We disagree.

¶ 25 1. *The Statute at Issue*

¶ 26 Section 2-1402(b) of the Code, provides, as follows:

"Any citation served upon a judgment debtor or any other person shall include a certification by the attorney for the judgment creditor or the judgment creditor setting forth the amount of the judgment, the date of the judgment, or its revival date, the balance due thereon, the name of the court, and the number of the case, and a copy of the citation notice required by this subsection. Whenever a citation is served upon a person or party other than the judgment debtor, the officer or person serving the citation shall send to the judgment debtor, within three business days of the service upon the cited party, a copy of the citation and the citation notice, which may be sent by regular first-class mail to the judgment debtor's last known address." 735 ILCS 5/2-1402(b) (West 2010).

¶ 27 2. *The Purposes of Service of Process and the Standard of Review*

¶ 28 The concept of service of process serves two underlying purposes. *Equity Residential Properties Management Corp. v. Nasolo*, 364 Ill. App. 3d 26, 31, 847 N.E.2d 126,

131 (2006). "First, service of process gives notice to those whose rights are about to be affected by the plaintiff's action." *O'Halloran v. Luce*, 2013 IL App (1st) 113735, ¶ 31, 988 N.E.2d 156. " 'Second, it vests jurisdiction in the court over the person whose rights are to be affected by the litigation.' " *Id.* (quoting *Nasolo*, 364 Ill. App. 3d at 31, 847 N.E.2d at 131). If a defendant is not served with process as required by law, the court has no jurisdiction over that person, and any default judgment entered against the defendant is void. *Nasolo*, 364 Ill. App. 3d at 32, 847 N.E.2d at 132. In order to satisfy "due process, notice must be reasonably calculated 'to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Hwang v. Illinois Department of Public Aid*, 333 Ill. App. 3d 698, 707, 776 N.E.2d 801, 809 (2002) (quoting *Stratton v. Wenona Community Unit District No. 1*, 133 Ill. 2d 413, 432, 551 N.E.2d 640, 648 (1990)). The issue of proper notice is a question of law, which we review *de novo*. *Hwang*, 333 Ill. App. 3d at 703, 776 N.E.2d at 806.

¶ 29

3. Plaintiff's Service-of-Process Claim

¶ 30

In support of her argument that the trial court lacked jurisdiction to consider defendant's amended third-party citation to discover assets, plaintiff contends that defendant's substitute service on her counsel did not satisfy the personal service of process requirements that she is entitled to under section 2-1402(b) of the Code.

¶ 31

Initially, we note the well-settled law that "notice to an attorney constitutes notice to the client and knowledge of an attorney is knowledge of, or imputed to the client, notwithstanding whether the attorney has actually communicated such knowledge to the client." *Segal v. Department of Insurance*, 404 Ill. App. 3d 998, 1002, 938 N.E.2d 192, 196 (2010). See *Eckel v. Bynum*, 240 Ill. App. 3d 867, 875, 608 N.E.2d 167, 174 (1992); *Williams v. Dorsey*, 273 Ill.

App. 3d 893, 898, 652 N.E.2d 1286, 1290 (1995).

¶ 32 In this case, the record shows that defendant mailed notice of her amended third-party citation to discover assets to plaintiff by mailing it to her counsel. Plaintiff does not claim that counsel did not receive defendant's notice on her behalf but, instead, suggests—without any citation to authority—that because defendant sought to "drive a wedge" between her and her counsel, a higher standard of service of process is required. We reject plaintiff's suggestion.

¶ 33 We similarly reject plaintiff's assertion that section 2-1402(d) required defendant to personally serve her with notice. Here, defendant mailed notice of the citation to plaintiff's counsel, which not only satisfied the plain language of section 2-1402(b) of the Code, but also plaintiff's due-process right to be informed of defendant's third-party citation to discover assets. Accordingly, we reject plaintiff's defective service of process claim.

¶ 34 B. Plaintiff's Financial Claim

¶ 35 Plaintiff also argues that the trial court erred by granting defendant's motion for turnover. We disagree.

¶ 36 Because the trial court's ruling was based on the parties' oral argument and the record, instead of an evidentiary hearing, we consider the court's decision *de novo*. *Dowling*, 226 Ill. 2d at 285, 875 N.E.2d at 1017.

¶ 37 In this case, the parties do not dispute that the trust account balance represented the remaining funds of plaintiff's inheritance that the firm managed under a security retainer agreement. In *Dowling*, the supreme court explained a security retainer agreement, as follows:

"Under this arrangement, the funds paid to the lawyer are not present payment for future services; rather, the retainer remains the

property of the client until the lawyer applies it to charges for services that are actually rendered. Any unearned funds are refunded to the client. The purpose of a security retainer is to secure payment of fees for future services that the lawyer is expected to perform. [Citation.] Pursuant to Rule 1.15(a) of the Illinois Rules of Professional Conduct, a security retainer must be deposited in a trust account and kept separate from the lawyer's own property.

188 Ill.2d R. 1.15(a)." *Id.* at 286, 875 N.E.2d 1018.

See *In re Marriage of Earlywine*, 2013 IL 114779, ¶ 15, 996 N.E.2d 642 (in which the supreme court, citing *Dowling*, reaffirmed that under a security retainer agreement, a client retains ownership of the funds paid to the attorney "until the lawyer applies it to charges for services actually rendered").

¶ 38 The issue before us concerns whether the remaining funds the firm held in the trust account pursuant to a security retainer agreement with plaintiff can be applied to partially satisfy plaintiff's indebtedness to defendant. Citing section 9-327 of the Uniform Commercial Code (810 ILCS 5/9-327 (West 2010))—which governs priority among conflicting security interests in the same deposit account—plaintiff asserts the firm had a perfected and superior security interest in the trust account funds by virtue of its possession of those funds, notwithstanding her acknowledgment that she owned the funds at issue. In this regard, plaintiff claims that defendant was not entitled to the funds until she terminated her counsel's representation and any unearned funds were refunded. If we were to agree with plaintiff, however, it would only encourage the type of gamesmanship that the facts of this case so clearly illustrate.

¶ 39 Here, the clear import of plaintiff's position is that a debtor could conceivably shield her entire estate from the reach of creditors by merely transferring those assets to an attorney under a security retainer agreement, citing payment for past, present, or future representation, but still have ready access to those assets in much the same way a depositor has access to his funds at his local banking institution. Plaintiff contends that *Dowling* supports her position because a security retainer agreement "provides the greatest protection for the client's funds." Despite her claim, we reject plaintiff's assertion as inconsistent with *Dowling* and *Earlywine*. In those cases, the supreme court explained that a security retainer is the best vehicle to protect a client's funds for the following reasons:

" 'Separating a client's funds from those of the lawyer protects the client's retainer from the lawyer's creditors. [Citation.] Commingling of a lawyer's funds with those of a client has often been the first step toward conversion of a client's funds. In addition, commingling of a client's and the lawyer's funds presents a risk of loss in the event of the lawyer's death.' *Earlywine*, ¶ 17 996 N.E.2d at 642 (quoting *Dowling*, 226 Ill. 2d at 292-93, 875 N.E.2d at 1021).

¶ 40 Accordingly, we reject plaintiff's claim that the trial court erred by granting defendant's motion for turnover.

¶ 41 In so concluding, we also reject plaintiff's remaining argument that the trial court erred by not holding an evidentiary hearing to determine the priority of the firm's claim for plaintiff's trust account funds. As we have already noted, the firm's claim on those funds is operative only after it proffers a bill for legal services rendered.

¶ 42

III. CONCLUSION

¶ 43

For the reasons stated, we affirm the trial court's judgment.

¶ 44

Affirmed.